

FILED
COURT OF APPEALS
DIVISION II

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STATE OF WASHINGTON

BY  DEPUTY

Case Number 44197-7-II

IN THE COURT OF APPEALS IN AND FOR THE
STATE OF WASHINGTON
DIVISION II

MARIUSZ K. KOWALEWSKI, Appellant

v.

BARBARA KOWALEWSKA, Respondent

ON APPEAL FROM THE SUPERIOR COURT OF THE
STATE OF WASHINGTON COUNTY OF PIERCE

The Honorable Kathryn Nelson, Presiding at the Trial
Court

RESPONDENT'S BRIEF - CORRECTED

ORIGINAL

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I. Assignment of Error

The trial court did not err in denying the Petitioner's Motion for Relief, and did not err in refusing to award attorney fees.

II. Issues presented for review

I. DID THE SUPERIOR COURT ABUSE ITS DISCRETION WHEN THE COURT DIRECTED MS. KOWALEWSKA TO PROMPTLY RETURN \$300.00 TO MR. KOWALEWSKI?

II. DID THE SUPERIOR COURT ABUSE ITS DISCRETION WHEN THE COURT FOUND NO CONTEMPT OR INTRANSIGENCE?

III. DID THE SUPERIOR COURT ABUSE ITS DISCRETION WHEN IT DECLINED TO AWARD FEES TO THE PETITIONER?

IV. IS THE HOLD HARMLESS CLAUSE IN THE DISSOLUTION DECREE A BAR TO FURTHER RELIEF AS BETWEEN THE PARTIES?

III. Statement of the Case

This is the second appeal brought by Mr. Kowalewski within the last ten months C.P. 38: 24-28. The amount at issue was the value collected by DCS. C.P. 66.

Mrs. Kowalewska thought she could collect money on an "old" child support obligation from Mr. Kowalewski, arising out of a prior, dismissed dissolution action C.P. 33. She was not correct. When she retained present counsel, counsel determined that Mrs. Kowalewska was not correct, and halted Mrs. Kowalewska's collection action C.P. 38 21-22. Mr. Kowalewski pressed on because he wanted a refund and he wanted his attorney fees C.P. 14. The Court ordered the sum collected by DCS to be returned

C.P. 66. Mr. Kowalewski's fee request was denied after the Court heard argument on the issue C.P. 66.

Without providing the transcript of the argument to this Court, Mr. Kowalewski appeals the trial Court's decision. See Designation of Clerk's Papers filed February 5, 2013.

IV. Argument

STANDARD OF REVIEW

As Appellant points out in his opening brief, "Where the decision or order of the trial court is a matter of discretion, it will not be disturbed on review except on a clear showing of abuse of discretion, that is, discretion manifestly unreasonable, or exercised on untenable grounds, or for untenable reasons." *State ex rel. Carroll v. Junker*, 79 Wn.2d 12, 26, 482 P.2d 775 (1971).

Appellant suggests that the appellate court could "review the interpretation of the decree" Opening Brief, P. 2, and suggests this Court can review the decree *de novo*. There is no basis to request that this court modify the trial court's decree or re-open the judgment. That request was never made to the trial court and there is no record in the Clerk's Papers as designated by the Appellant of any attempt on the part of the Appellant to vacate or re-open the Decree as to the Hold Harmless Clause contained in the Decree. C.P. 4:9-12.

Furthermore, Mrs. Kowalewska's ill-advised attempt to collect on the "old" child support obligation, from a prior dismissed action, does not arise out of the decree in the current matter.

ISSUE ONE

Did the trial court abuse its discretion when it ordered Ms. Kowalewska to return the \$300.00 DCS assisted her in collecting?

"Judicial discretion is a composite of many things, among which are conclusions drawn from objective criteria; it means a sound judgment exercised with regard to what is right under the circumstances and without doing so arbitrarily or capriciously" *State ex rel. Carroll v. Junker*, Id at 26. Judge Nelson had extensive experience with this case and these parties. She presided over an eight-day trial between these parties in 2005. Appellant's Brief, Page 5. Her decision not to further fan the flames of litigation was within her discretion.

Mrs. Kowalewska complied with Judge Nelson's order that she re-pay Mr. Kowalewski \$300.00 garnisheed from his bank account by DCS C.P. at 66. Had she not complied with Judge Nelson's order and re-paid Mr. Kowalewski, then arguably that would have been a basis for a contempt finding.

This was an exercise of judicial discretion. Judge Nelson decided that this was the right order under the circumstances at issue, and there was nothing arbitrary or capricious about her decision.

ISSUE TWO

Did the trial court abuse its discretion when the Court found no contempt or intransigence?

The term “may” in a statute generally confers discretion. *Nat’l Elec. Contractors Ass’n v. Riveland*, 138 Wn.2d 9, 28, 978 P.2d 481 (1999) (citing *Yakima County (W. Valley) Fire Prot. Dist. No. 12 v. City of Yakima*, 122 Wn.2d 371, 381, 858 P.2d 245 (1993)). A determination of contempt or intransigence is within the sound discretion of the trial court.

The trial Court’s decision to not find intransigence or contempt on the part of Ms. Kowalewska was clearly discretionary.

The trial Court correctly exercised its discretion when it declined to find Ms. Kowalewska had been intransigent or had engaged in contumacious behavior. C.P. 66.

ISSUE THREE

Did the trial court abuse its discretion when it declined to award fees to the Petitioner?

[The Court] review[s] a grant or denial of attorney fees for abuse of discretion. *Morgan v. City of Federal Way*, 166 Wash.2d 747, 758, 213 P.3d 596 (2009).

There was no abuse of discretion in the Court’s finding that there was no contempt or intransigence, and it follows logically that having declined to find contempt or intransigence, the Court did not award fees. Here, Judge Nelson expressly declined to award fees on the basis that she had not found contempt or intransigence. Order on Motion, October 12, 2012, C.P. 66.

Intransigence includes pursuing meritless appeals for the purpose of delay and expense *Gamache v. Gamache*, 66 Wn.2d 822, 829-30, 409 P.2d 859 (1965).

ISSUE FOUR

Does the Hold Harmless Clause in the Decree of Dissolution act as an absolute bar to further proceedings between the parties?

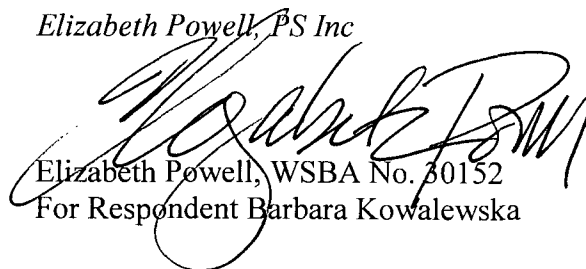
A hold harmless clause is not intended to address debts or obligations that may exist as between the parties. It is there so litigants have protection against the actions of third parties attempting to collect on debts post-decree. *In re the Matter of the Marriage of Greenlee*, 65 Wash. App. 703, 829 P. 2d 1120 (1992)

V. CONCLUSION

Having failed to achieve his goal in the trial court, Appellant presents his case to the Court of Appeals, without providing a full and complete record of the proceedings below. This Court should affirm the decision of the trial court.

Respectfully submitted this 10th day of May, 2013.

Elizabeth Powell, PS Inc



Elizabeth Powell, WSBA No. 30152
For Respondent Barbara Kowalewska

CERTIFICATE OF TRANSMISSION On this day, I emailed a true and correct .pdf of this document to Mr. Mills at his email address of record, as previously agreed between

counsel. I declare under penalty of perjury that the foregoing is true and correct. Signed
at Tacoma, WA, on May 10, 2013.


Elizabeth Powell